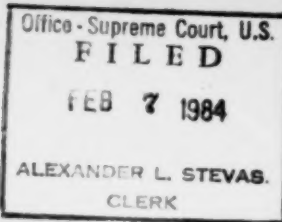


83-1302



NO .

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

GUILLERMO T. NAVA
PETITIONER

VS.

MERIT SYSTEMS PROTECTION BOARD
RESPONDENT

On Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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Attorneys for Petitioner

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Attorneys for Petitioner

QUESTION PRESENTED

1. Did the United States Court of Appeals for the Federal Circuit erred in denying Petitioner's Motion For Leave to File Appeal because Petitioner did not appeal the decision of the Merit Systems Protection Board within the 30 days statutory time limit to the United States Court of Appeals for the Federal Circuit as stated in 5 USC 7703(b)(1)?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (App 1) is unreported.

JURISDICTION

The order of the United States Court of Appeals for the Federal Circuit was entered on November 9, 1983 (App 1), the jurisdiction of this Court is invoked under 28 U.S.C. 2101(c).

STATUTORY PROVISIONS

The pertinent provisions of the statute involved are set forth in (App 8).

STATEMENT OF FACT

On Friday, February 15, 1980, Petitioner was arrested by an officer of the Laredo, Texas police department and charged with the offense of driving while intoxicated. This incident occurred while Petitioner, an employee of the U. S. Customs Service, was off-duty and driving his own personal

vehicle. Further, Petitioner denies he is guilty of the charge lodged against him, or of any other offense arising from that incident.

Following said incident, Petitioner was not scheduled to work until 7:00 A.M. on Sunday, February 17, 1980. Upon reporting to work, Petitioner saw a notice that Customs Patrol Officer Roberto Rivera was acting supervisor that day. Before beginning his tour of duty, Petitioner informed Rivera of his arrest. Said report of the arrest was within thirty-four hours of the incident. Although he had been advised of the arrest, Officer Rivera did not inform Petitioner of any further procedures he would need to follow to make a complete report. Nevertheless, Petitioner endeavored to ensure that a complete report was made. A copy of the Customs Policies and Procedures Manual was not available at the Laredo Station where Petitioner worked, so he contacted, among others, E.E.O. Officer Morales in Houston, Texas. Officer Morales advised Petitioner that she was not aware of any policy which would require any type of report in addition to the oral report made to Acting Supervisor Rivera.

Nevertheless, on February 21, 1980, Plaintiff prepared said report to be delivered to his supervisors, Jack Compton and James E. Caldwell, on February 25, 1980.

Petitioner was charged with violation of the U.S. Customs Policies and Procedures Manual Section 41735, titled "Conduct and Employee Responsibilities", paragraph 41735.2I.1.a, page 11 which reads:

Employees who are arrested or detained in connection with any violation of Federal, State or local law, or formally charged with such violation, exclusive of traffic violations for which a fine of \$50.00 or less is the maximum that may be imposed, or which involves only a traffic warning or citation, will promptly report such matters by the most expeditious means available to their supervisors.

The final order terminating Petitioner's employment was dated April 7, 1983 and received by him on April 11, 1983. Petitioner did not attempt to challenge this decision but on the advice of his previous attorney, Petitioner filed a complaint in United States District Court in Laredo, Texas.

Said suit was filed within thirty days of receipt of the Merit Systems Protection Final Order, as specified in said order and in 5 U.S.C. §7703(b) (1). While the suit was filed within the proper time period, it was filed in the wrong court.

On September 28, 1983, Petitioner filed his Motion for Leave to File Appeal in the United States Court of Appeals for the Federal Circuit in order to be allowed to correct the error of Petitioner's former attorney. On November 9, 1983, said Court of Appeals denied Petitioner's Motion for Leave to File Appeal. Petitioner now submits this his Petition for Certiorari to this Honorable Supreme Court of the United States of America.

EXISTENCE OF JURISDICTION BELOW

Petitioner filed its Original Appeal on August 1, 1980, from the action taken by the U. S. Department of Treasury, U. S. Customs Service, Iaredo, Texas, in the Dallas Field Office of the United States Merit Systems Protection Board. Jurisdiction was founded on 5 U.S.C. §1205 in that the Merit Systems Protection Board has the power to hear an appeal from the U. S. Department of Treasury, U. S. Customs Service.

REASONS FOR GRANTING THE WRIT

In this case there is an important question of federal law which has not been, but should be, settled by this Court.

I.

The important question of federal law that needs to be reviewed by this Court involves the time limitation of judicial review of the final decisions of the Merit Systems Protection Board. Petitioner submits to this Court that when a petition for review of a final order of the Merit Systems Protection Board is filed within 30 days after the date the petitioner received notice of the final order of the Board in a Federal District Court, by mistake, instead of the United States Court of Appeals for the Federal Court, then said petition for review shall be considered timely filed under 5 U.S.C. §7703 (b)(1).

Petitioner has made numerous and persistent efforts to challenge the decision to terminate his employment. He has previously employed two attorneys, and several others have refused to represent him in contesting the decisions of the U. S.

Customs Service and the Merit Systems Protection Board. He has, to the best ability, worked within the rules and procedures established by the Federal government and its agencies. He has twice written to his Congressman seeking his help in getting his job back. All of these efforts demonstrate that the Plaintiff has diligently tried to fight for his job.

In this case, Petitioner filed his petition for review in the Federal District Court, Southern District of Texas, Laredo Division, instead of the United States Court of Appeals for the Federal Circuit as stated in 5 U.S.C. 7703 (b)(1). Petitioner filed said petition within the 30 days time limitation for judicial review as stated in 5 U.S.C. 7703 (b)(1). Petitioner was diligent in appealing the final decision of the Merit Systems Protection Board. Petitioner did not sleep on his rights. Petitioner diligently filed an appeal within the time limitation but, unfortunately in the wrong court.

In September, 1983, Petitioner filed a Motion For Leave To File Appeal in the United States Court of Appeals for the Federal Circuit while his other petition in the Federal District Court in Laredo, Texas was still pending in order to correct Petitioner's mistake. Said Court of Appeals for the Federal Circuit denied said Petitioner's motion holding that his petition for review was not filed within the 30 days period in the U. S. Court of Appeals for the Federal Circuit. This Court should consider the diligence with which Petitioner has attempted to have his case review by the proper court.

When a party has failed to initiate litigation within a prescribed period of time, courts have often looked to the diligence with which a Plaintiff has attempted to have his day in Court. See Powell v. Zuckert, 366 F.2d 634, 636 (D.C. Cir. 1966); Ritter v. Strauss, 261 F.2d 767, 772, (D.C. Cir. 1958); Duncan v. Summerfield, 251 F.2d 896, (D.C. Cir. 1957). Even if a defendant were able to prove that a plaintiff's attempts to institute


an appeal were less than diligent, that defendant would also have to prove that the delay was in some way prejudicial to him. Powell at 638, Duncan at 897, Motto v. General Services Administration, 322 F.Supp. 1218, 1220 (E.D. La. 1971). No such prejudice is to be found in this case.

CONCLUSION

This Court should review this case because of the important question of federal law which has not been, but should be, settled by this Court. For this reason and the above stated reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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512/724-8355

BY: _____


C. M. ZAFFIRINI,
Attorney for Petitioner
State Bar No. 22241000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed

Director, Personnel Management
Division
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Washington, D.C. 20415

Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

on this the 6th day of February, 1984.



C. M. ZAMFIRINI

GUILLERMO T. NAVA,)	
)	
Petitioner,)	
)	
v.)	ON MOTION
)	
MERIT SYSTEMS PROTECTION)	
BOARD,)	
)	
Respondent.)	

Before BALDWIN, Circuit Judge.

O R D E R

At petitioner's request, the Motion For Leave To File Appeal has been submitted to a circuit judge of this court. Petitioner's Motion For Leave To File Appeal is denied.

The Merit Systems Protection Board rendered a decision in April, 1983, making an appeal in this court due in May, 1983. 5 USC 7703(b)(1). Petitioner did not appeal to this court until September, 1983, several months after the statutory due date for appeal. The 30 day statutory time limit for appeals cannot be waived by this court. Accordingly, petitioner's request to file an appeal out of time is denied.

Nov. 9, 1983

/s/

Phillip B. Baldwin,
Circuit Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

<hr/>)
GUILLERMO T. NAVA)
)
v.) DOCKET NUMBER
) DA07528010217
DEPARTMENT OF TRASURY)
<hr/>)

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on November 28, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. §1201.115, the Board hereby DENIES the petition.*/

*/ See Weaver v. Department of the Navy, 2 MSPB 297 (1980) (Board held that it will not undertake a full review of the record where the party petitioning for review has not demonstrated error by the presiding official with specific references to the record); and Karapinka v. Department of Energy, 6 MSPB 114 (1981) (Board held that where a party alleges the presiding official erred by failing to comply with time limit prescribed in 5 CFR, § 1201.111, such party has the burden of proving that the alleged error is harmful).

The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court which respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e5(f) - (k), and 29 U.S.C. § 749a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United

States District Court, the appellant has the statutory right under 5 U.S.C. §7703(b)(1) to seek judicial review of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. §7703(b)(1) that a petition for such judicial review be filed with the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

APR 7 1983

(Date)

/s/

Robert E. Taylor
Secretary

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
ORDER was sent by certified mail this date to:

Guillermo T. Nava
719 New York
Laredo, Tx 78040

by regular mail service to:

Sharon Trigo, Esq.
1417 Mier Street
Laredo, Tx 78040

Director, Personnel Management
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(Date)

Robert E. Taylor
Secretary

Washington, D.C.

U. S. Customs Policies and Procedures Manual
Section 41735, titled "Conduct and Employee Responsibilities", paragraph 41735.2I.1.a, page 11

Employees who are arrested or detained in connection with any violation of Federal, State or local law, or formally charged with such violation, exclusive of traffic violations for which a fine of \$50.00 or less is the maximum that may be imposed, or which involves only a traffic warning or citation, will promptly report such matters by the most expeditious means available to their supervisors.

§ 7703. Judicial review of decision of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date of the petitioner received notice of the final order or decision of the Board.

No. 83-1302

Office - Supreme Court, U.S.
FILED
APR 17 1984
~~ALEXANDER~~ L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

GUILLERMO T. NAVA, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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No. 83-1302

GUILLERMO T. NAVA, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges an order of the court of appeals denying his motion for leave to file an untimely appeal from a decision of the Merit Systems Protection Board (MSPB).

1. On February 15, 1980, petitioner, a Customs Patrol Officer, was arrested on a charge of driving while intoxicated (Pet. 1). The Customs Service found that in connection with this incident, petitioner had violated a provision in the Customs Service Policy and Procedures Manual that requires employees who are arrested or detained in connection with a violation of federal, state or local law, promptly to report the arrest to a supervisor by the most expeditious means available (Pet. 3). After petitioner was given an opportunity to respond to the charges, a final decision was

made to remove petitioner from employment, effective July 11, 1980.¹

2. Petitioner appealed to the MSPB pursuant to 5 U.S.C. 7701. Following a hearing in which petitioner raised a claim of discrimination on the basis of national origin (Mexican-American) and challenged the substance of the charge, the presiding official issued a decision affirming the agency's decision. On April 7, 1983, the Board denied petitioner's request for rehearing (Pet. App. 2-4).

On April 29, 1983, petitioner attempted to appeal from the Board's decision by filing a pro se lawsuit in the United States District Court for the Southern District of Texas (C.R. 1).² By order dated June 13, 1983, the court informed petitioner that if the basis of his complaint was a claim of discrimination, then review would lie in the district court under 5 U.S.C. 7703(b)(2); on the other hand, if his claim was only that the MSPB's decision on the issues other than discrimination was incorrect, jurisdiction would lie in the court of appeals under 5 U.S.C. 7703(b)(1). The district court also informed petitioner that although the complaint alleged discrimination and retaliation, such claims were unsupported by factual allegations and the essence of his claim appeared to be that the agency's decision removing him was not supported by substantial evidence. The court therefore ordered that petitioner be allowed additional time to amend his complaint to allege facts supporting his discrimination claim, if he chose to do so (C.R. 4).

¹The agency considered two previous disciplinary actions taken against petitioner in arriving at the decision to remove him. See Decision of the MSPB presiding official, November 28, 1980 (at 8-9) (lodged with the Clerk of the Court).

²"C.R." refers to the documents in the clerk's record of the proceedings filed by petitioner in the district court (No. L-83-63).

Petitioner did not amend his complaint to allege discrimination. Instead, he obtained a stay of the district court proceedings and, now represented by counsel, filed a motion for leave to file an untimely appeal in the United States Court of Appeals for the Federal Circuit. The court of appeals denied that motion by order dated November 9, 1983 (Pet. App. 1). In its order, the court noted that by statute, 5 U.S.C. 7703(b)(1), petitioner's appeal should have been filed in the court of appeals no later than May 1983, 30 days after petitioner received notice of the MSPB's final decision in April 1983. The court held that the "statutory time limit for appeals cannot be waived by this court" (Pet. App. 1).³

3. The court of appeals correctly rejected petitioner's effort to file an untimely appeal. Its decision does not warrant review by this Court.

Pursuant to 5 U.S.C. 7703(b)(1), a petition to review a final order or decision of the MSPB — except in cases involving allegations of discrimination — must be filed in the court of appeals "within 30 days after the date the petitioner received notice of the final order or decision of the Board."⁴ In this case, the Board's decision was issued on

³On November 29, 1983, petitioner moved in the district court to dismiss his complaint. By order filed the same day, that motion was granted (C.R. 10-11).

⁴The Federal Courts Improvement Act of 1982 vests the Federal Circuit with exclusive jurisdiction over petitions for review of a final order of the MSPB. § 127(a), 28 U.S.C. 1295(a)(9). However, in "mixed cases," which involve allegations of discrimination as well as challenges to the adverse personnel action, jurisdiction lies exclusively in the district court. 5 U.S.C. 7703(b)(2); *Williams v. Department of Army*, 715 F.2d 1485, 1489 (Fed. Cir. 1983) (en banc). In this case, since petitioner apparently did not wish to pursue his discrimination claim, judicial review of the MSPB's decision affirming his removal rested exclusively in the Federal Circuit. See *Christo v. Merit Systems Protection Board*, 667 F.2d 882 (10th Cir. 1981) (court of appeals "has

April 7, 1983, and petitioner did not attempt to file a notice of appeal to the Federal Circuit until September 28, 1983. The court of appeals was therefore plainly correct in holding that petitioner had failed to comply with the statutory time limit. Petitioner asserts that the court of appeals erred in denying his motion to file out of time since petitioner "diligently filed an appeal within the time limitation but, unfortunately in the wrong court" (Pet. 6).⁵ Contrary to petitioner's contention, the court of appeals lacks the power to extend the statutory time limit for equitable reasons because "[t]he filing requirement is jurisdictional." *Boehm v. Foster*, 670 F.2d 111, 113 (9th Cir. 1982). See also *Billops v. Department of the Air Force*, 725 F.2d 1160, 1163 (8th Cir. 1984); *Miller v. United States Postal Service*, 685 F.2d 148, 149 (5th Cir. 1982), cert. denied, No. 82-6291 (May 2, 1983).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1984

jurisdiction, under [5 U.S.C. 7703(b)(1)], * * * only over those cases seeking review of final agency action in which no claim of discrimination has been preserved for judicial review").

⁵Petitioner commenced his action in the district court within the 30 day statutory period (5 U.S.C. 7703(b)(2)). Had he not withdrawn his complaint (see note 3, *supra*), petitioner could have sought to transfer his action to the court of appeals pursuant to 28 U.S.C. 1631. That provision grants federal courts power to transfer cases over which they lack jurisdiction to the "court in which the action or appeal could have been brought at the time it was filed or noticed," if a transfer would be "in the interest of justice."